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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COUNTY OF LOS ANGELES,

Plaintiff and Respondent,

v.

SAFETY NATIONAL CASUALTY
CORPORATION,

Defendant and Appellant.

B214806

(Los Angeles County Super. Ct.
No. SJ1027)

APPEAL from the judgments of the Superior Court of Los Angeles County, Richard S. Kemalyan, Judge, and Harold S. Vites, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Nunez & Bernstein and E. Alan Nunez for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, Robert E. Kalunian, Acting County Counsel, and Brian T. Chu, Principal Deputy County Counsel, for Plaintiff and Respondent.

Bail was forfeited after a defendant in a felony action failed to appear in court in Los Angeles County. Within 180 days of the bail forfeiture, a person with the same name as the defendant was issued a notice to appear in the Los Angeles case by the Sheriff of San Bernardino County, but the defendant failed to appear on the date in the notice. The trial court denied the surety relief from the forfeiture on the ground the surety failed to file a timely motion relying on Penal Code section 1305, subdivision (c)(3).¹ In so ruling, the trial court chose to rely on the holding in *People v. Lexington National Ins. Co.* (2007) 158 Cal.App.4th 370 (*Lexington I*) and rejected the contrary decision of our colleagues in Division Six in *People v. Ranger Ins. Co.* (2006) 141 Cal.App.4th 867 (*Ranger*).

Safety National Casualty Corporation, the surety on the bond, appeals from the trial court's order denying its motions for relief from forfeiture and from summary judgment in favor of the County of Los Angeles. In its opening brief, Safety National argues the trial court was required, sua sponte, to set aside the forfeiture pursuant to section 1305, subdivision (c)(3), because the defendant on the underlying case was arrested in San Bernardino County on the Los Angeles County case and there is no requirement of a motion to vacate the forfeiture within 180 days under subdivision (c)(3). In the reply brief, Safety National adds the new argument that its motion to set aside the forfeiture under subdivision (c)(1) of section 1305 was timely and sufficient to make its oral motion under subdivision (c)(3) timely, citing the recently decided *People v. Lexington Ins. Corp.* (2010) 181 Cal.App.4th 1485 (*Lexington II*). We accept Safety National's argument that *Lexington II* compelled the trial court to address the merits of all jurisdictional grounds for vacating the forfeiture, but hold the surety was not entitled to relief under section 1305, subdivision (c)(3), because no evidence was presented that the person named in the notice to appear was arrested on the Los Angeles County case in San Bernardino County.

¹ All statutory references are to the Penal Code unless otherwise stated.

PROCEDURAL AND FACTUAL BACKGROUND

On July 14, 2007, Safety National posted a bail bond in the amount of \$20,000 to secure the release of Maria Concepcion Hernandez on a Los Angeles County felony arrest for burglary in violation of section 459. The case was filed as a misdemeanor burglary under case No. 7NW03004. The bond was forfeited when Hernandez failed to appear in court on August 13, 2007. A bench warrant issued for Hernandez, with bail reset at \$100,000. Notice was mailed to Safety National on August 13, 2007, informing the surety that unless Hernandez was surrendered within 185 days,² the obligation to pay the bond would become absolute. The 185th day was February 14, 2008.

On October 15, 2007, the Los Angeles Superior Court received a “NOTICE TO APPEAR” that had been issued to “Maria Hernandez” by the County of San Bernardino Sheriff’s Department on September 17, 2007. The notice references a “MISD WARR REL NEW7NW0300401 PC 459.” The notice includes a signed promise to appear on October 24, 2007. A handwritten notation on the side of the notice to appear indicates “NO BOOKING NUMBER.” Hernandez failed to appear in the Los Angeles Superior Court on October 24, and the court issued another warrant with bail in the amount of \$100,000.

The Surety’s Motion to Vacate the Forfeiture and Exonerate the Bond

On February 14, 2008, Safety National filed a notice of motion and motion to vacate the forfeiture and exonerate the bond, citing section 1305, subdivision (c)(1).³

² The statutory time to move to vacate a forfeiture is 180 days, but five additional days are granted if notice is mailed. (§ 1305, subd. (b).)

³ Section 1305, subdivision (c)(1), provides for release of the obligation of the surety as follows: “If the defendant appears either voluntarily or in custody after surrender or arrest in court within 180 days of the date of forfeiture or within 180 days of the date of mailing of the notice if the notice is required under subdivision (b), the court

Pursuant to section 1305, subdivision (c)(1), if the defendant appears voluntarily or in custody within 180 days of forfeiture, the court on its own motion at the time the defendant first appears in court on the case which the forfeiture was entered, shall direct the forfeiture be vacated and the bond exonerated. In the points and authorities attached to the motion, Safety National indicated Hernandez had received an “own recognizance release to appear” from the Sheriff of San Bernardino County.

The motion was heard on February 26, 2008. At the hearing on the motion, the trial court indicated that Hernandez was picked up by the Sheriff of San Bernardino County, and it appeared that the clerk, and not the court, had recalled the warrant on October 15, 2007. Because the court never ordered the warrant recalled and Hernandez had never appeared, the court refused to set aside the forfeiture under section 1305, subdivision (c)(1).

Having failed to gain relief on the ground relied upon in the moving papers, counsel for Safety National orally moved to vacate the forfeiture on a different ground, switching reliance to section 1305, subdivision (c)(3).⁴ The trial court denied the motion under subdivision (c)(3) on two grounds: the court had no evidence before it that Hernandez was in custody on a warrant from this case rather than on some other case; and any motion under section 1305, subdivision (c)(3), was untimely, as the motion was

shall, on its own motion at the time the defendant first appears in court on the case in which the forfeiture was entered, direct the order of forfeiture to be vacated and the bond exonerated. If the court fails to so act on its own motion, then the surety’s or depositor’s obligations under the bond shall be immediately vacated and the bond exonerated. An order vacating the forfeiture and exonerating the bond may be made on terms that are just and do not exceed the terms imposed in similar situations with respect to other forms of pretrial release.”

⁴ Section 1305, subdivision (c)(3), provides for release of the surety of its obligation on the bond as follows: “If, outside the county where the case is located, the defendant is surrendered to custody by the bail or is arrested in the underlying case within the 180-day period, the court shall vacate the forfeiture and exonerate the bail.”

orally made on day 192 following the notice of forfeiture, which was beyond the statutory 185-day period to file a motion on that ground.

Judgment on the forfeited bond was entered and mailed on April 25, 2008.

The Surety's Motion to Set Aside the Summary Judgment

On May 21, 2008, Safety National filed a motion to continue a hearing⁵ to set aside the summary judgment that had purportedly been scheduled for May 23, 2008. The motion was accompanied by points and authorities arguing that the general rule requiring a motion for relief within 180 days of forfeiture under section 1305 does not apply to motions under subdivision (c)(3), citing *Ranger, supra*, 141 Cal.App.4th 867.

According to the County, as of February 14, 2008, the trial court was without jurisdiction to do anything but enter summary judgment on the forfeited bond, which was done, and there is no jurisdiction to entertain Safety National's motion to set aside the forfeiture under section 1305, subdivision (c)(3).

In its reply, Safety National argued there is no question Hernandez was arrested on this case and released in San Bernardino on her own recognizance. The arrest was reflected in the trial court's own records. The bondsman did, in fact, file a timely motion to exonerate bail in this case, which was erroneously denied.

The Trial Court's Denial of the Motion to Vacate the Summary Judgment

An order dated January 23, 2009, indicated that a hearing was held on December 19, 2008, on Safety National's motion to set aside the summary judgment. The judicial officer on this motion was not the same as the judicial officer who earlier denied the motion to vacate the bail forfeiture. As pertinent to this appeal, the order

⁵ The motion to continue the hearing to set aside the summary judgment was unusual, in that no such motion had been filed. Apparently, the attached points and authorities constituted Safety National's motion.

stated the trial court’s belief that there were two issues pending: whether Hernandez’s “cite out is an arrest on the underlying case”; and whether section 1305, subdivision (c)(3), requires a written motion within the 180-day period.

The trial court resolved the first issue in favor of Safety National, ruling that it “is clear to this court that the cite was an arrest.” Turning to the second issue, the trial court chose to follow *Lexington I* rather than *Ranger*. Although Hernandez was cited out and technically in custody, Safety National made no effort to locate Hernandez during the 180-day period and no motion to extend the period was filed.

A notice of appeal was filed on March 12, 2009, from the order of January 23, 2009, denying the motion for relief from forfeiture and from the summary judgment.

DISCUSSION

The parties devote much of their briefing to the issue of whether subdivision (c)(3) of section 1305 is subject to the general timeliness rule set forth under section 1305. As noted above, the two decisions of the Courts of Appeal on this subject—*Ranger* and *Lexington I*—have reached inconsistent results. The issue is currently pending in the California Supreme Court.⁶

The parties further disagree over the application of *Lexington II* to this appeal. Under *Lexington II*, the trial court is obligated to consider all jurisdictional grounds for setting aside a bail forfeiture at a timely hearing pursuant to section 1305. (*Lexington II*, *supra*, 181 Cal.App.4th at pp. 1491-1492.) Thus, Safety National argues that under *Lexington II*, the trial court should have granted relief under subdivision (c)(3) of section 1305 at both the motion to vacate and the motion to set aside the summary

⁶ *People v. Indiana Lumbermens Mut. Ins. Co.* (S175907, review granted Oct. 22, 2009). According to the website of the California Supreme Court, the issue presented is: “When a criminal defendant is surrendered into custody or arrested in another county within 180 days of the date of notice that the bail bond has been forfeited, does Penal Code section 1305 require the surety on the bond to file its motion to vacate the forfeiture and exonerate the bond within that period of 180 days in order to obtain relief?”

judgment, because the original motion sets forth grounds showing that Hernandez had been arrested in San Bernardino.

We find it unnecessary to take sides in the dispute between the decisions in *Ranger* and *Lexington I*. Consistent with *Lexington II*, we assume the merits of Safety National's argument under subdivision (c)(3) of section 1305 were properly before the trial court at the time of the motion to vacate the forfeiture, although only subdivision (c)(1) was cited in the moving papers, because the existence of the out of county notice to appear is mentioned in the moving papers. However, we hold Safety National's argument fails on the appellate record provided.

Standard of Review

“‘An order denying a motion to set aside a forfeiture is appealable.’ (*People v. Ranger Ins. Co.* (1996) 51 Cal.App.4th 1379, 1382.) On appeal, we review the trial court's resolution of a motion to set aside a bail forfeiture under the abuse of discretion standard (*People v. Legion Ins. Co.* (2002) 102 Cal.App.4th 1192, 1195), subject to the protections afforded by the statutory scheme addressing bail forfeiture (see § 1305 et seq.). When a statutory scheme, such as that pertaining to bail forfeiture, ‘requires a court to exercise its jurisdiction in a particular manner, to follow a particular procedure, or to act subject to certain limitations, an act beyond those limits is in excess of its jurisdiction.’ (*People v. Ranger Ins. Co.*, *supra*, 51 Cal.App.4th at p. 1384; see *People v. Legion Ins. Co.*, *supra*, 102 Cal.App.4th at p. 1196.)” (*Lexington II*, *supra*, 181 Cal.App.4th at p. 1489.)

The law disfavors forfeitures, including forfeitures of bail. (*Lexington II*, *supra*, 181 Cal.App.4th at p. 1489.) “‘The standard of review, therefore, compels us to protect the surety, and more importantly the individual citizens who pledge to the surety their property on behalf of persons seeking release from custody, in order to obtain the corporate bond.’ (*County of Los Angeles v. Surety Ins. Co.* (1984) 162 Cal.App.3d 58, 62.)” (*Lexington II*, *supra*, at pp. 1489-1490.)

“A fundamental principle of appellate review is that a judgment correct in law will not be reversed merely because given for the wrong reason; we review the trial court’s judgment, not its reasoning. [Citations.]” (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 64.)

Application of Section 1305, subdivision (c)(3)

Under section 1305, subdivision (c)(3), the surety or depositor of bail is released of all obligations under the bond in two situations: when “outside the county where the case is located, the defendant is surrendered to custody by the bail or is arrested in the underlying case within the 180-day period.” There is no claim in this case that Hernandez was surrendered by Safety National, so the first provision of subdivision (c)(3) is clearly inapplicable. The remaining issue is whether Hernandez was “arrested in the underlying case” by the Sheriff of San Bernardino County. We agree with the County that there is no evidence Hernandez was arrested in the underlying case.

The only evidence presented as to what occurred in San Bernardino County in this case was the notice to appear issued to “Maria Hernandez.” Safety National presented no evidence of any type regarding the circumstances surrounding the contact between the Sheriff of San Bernardino County and the person identified as Maria Hernandez. No photographs, fingerprints, or descriptions of Hernandez from either the Los Angeles County case or San Bernardino County are contained in the record. No police report from San Bernardino has been presented. The only evidence pertaining to whether the person identified as Maria Hernandez was booked into custody is a handwritten notation indicating “NO BOOKING NUMBER.”

The two judges below who considered the evidence reached different conclusions on the issue of whether Hernandez was arrested in San Bernardino on the Los Angeles warrant. In denying the motion to vacate the forfeiture, the court found no evidence Hernandez was in custody on the Los Angeles warrant in San Bernardino. On the other hand, the court in denying the motion to set aside the summary judgment ruled it was

“clear to this court the cite was an arrest.” We hold there is no evidence Hernandez “was arrested in the underlying case within the 180-day period” for purposes of subdivision (c)(3) of section 1305.

An arrest is defined in section 834 as “taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person.”

Section 827.1 provides that a “person who is specified or designated in a warrant of arrest for a misdemeanor offense may be released upon the issuance of a citation, in lieu of physical arrest, unless one of” eleven disqualifying circumstances exist, none of which are applicable in this case.

Given the record on appeal, we reject the premise of Safety National’s argument—that Hernandez was arrested in San Bernardino—because there is absolutely no evidence the person identified as Hernandez was ever taken into custody, which is the statutory definition of arrest. (§ 834.) The record establishes that someone identified by the name “Maria Hernandez” was cited to appear on the bench warrant in this case, but nothing more than that has been shown. There is not a hint of evidence the person who signed the notice to appear was the defendant in the Los Angeles County case or that she was ever in custody on the case.

We recognize that the trial court in the order denying the motion to set aside the summary judgment stated that it “is clear to this court that the cite was an arrest.” However, there is no evidence to support this conclusion. The record is totally devoid of any evidence that the defendant named in the warrant was ever in custody on the Los Angeles case while in San Bernardino. All the record demonstrates is that someone named “Maria Hernandez” signed a promise to appear in Los Angeles and that the person had no booking number. This is insufficient evidence to support Safety National’s contention under subdivision (c)(3) of section 1305.

DISPOSITION

The judgments are affirmed. Costs on appeal are awarded to the County of Los Angeles.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

FERNS, J.*

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.